

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-1269

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-1269

UNITED STATES OF AMERICA,

Appellee,

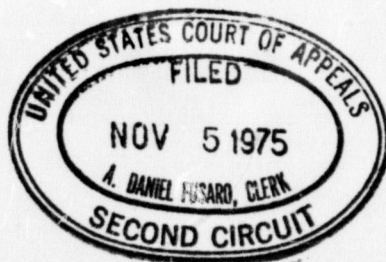
v.

JOHN McCLEAN, RAMON VIERA and EDWARD CODELIA,

Defendants-Appellants.

On Appeal From the United States District Court
For the Eastern District of New York

APPELLANT VIERA'S REPLY BRIEF



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of Trial its Intention to Call
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CONCLUSION

For the Reasons Stated Above and in
Appellants' Main Brief (Point VII)
the Judgment of Conviction as to
the Appellant Viera Should be Reversed
and a New Trial Ordered

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA	: No. 75-1269
Appellee,	:
-against-	:
JOHN McCLEAN, RAMON VIERA and	:
EDWARD CODELIA,	:
Appellants.	:

----- X

APPELLANT VIERA'S REPLY BRIEF

THE GOVERNMENT'S FAILURE TO DISCLOSE TO THE
APPELLANT VIERA IN ADVANCE OF TRIAL ITS
INTENTION TO CALL MRS. CALVO AS A WITNESS
REQUIRES REVERSAL OF THE JUDGMENT (REPLYING
TO RESPONDENT'S "POINT VI")

The Government contends in its brief (Point VI, pp. 42-46) that the failure of Mr. Kaplan, the Assistant United States Attorney in charge of the prosecution, to disclose to the appellant Viera in advance of trial that Mrs. Calvo was a probable Government witness does not provide ground for reversal of Viera's conviction because: (1) the non-disclosure was "inadvertent"; and (2) "did not prejudice" Viera. These two contentions will be discussed below.

(1)

The Government's contention that its failure

to disclose to Viera its intention to call Mrs. Calvo as a witness was "inadvertent" (resp.'s br. p. 46) is refuted by the conceded and undisputed facts in the record.

The Government concedes in its brief that "before the commencement of the trial ... the Assistant United States Attorney (Mr. Kaplan) ... decided to use Mrs. Calvo's testimony to show a prior similar act (1322)." (id. p. 42) It was admitted by Mr. Kaplan, when questioned by the trial judge, that "before the trial commenced" he knew that Mrs. Calvo and her deceased husband "Pepi" had been represented by Mr. Lazarus, Viera's counsel (record pp. 1322-1323). It is undisputed that Mr. Kaplan also knew that such representation of the Calvos by Mr. Lazarus had been "in a related proceeding." (resp.'s br. p. 42)

From these concessions and admissions it is impossible for the Government to claim that Mr. Kaplan's failure to disclose in advance of trial his intention to call Mrs. Calvo as a witness was the result of ignorance of any of the material facts.

Moreover, Mr. Kaplan never claimed that his failure to disclose his intention to call Mrs. Calvo as a witness was "inadvertent". On the contrary, when asked by the trial judge "why" he had failed to "tell Mr. Lazarus about it so he could at least make a determination about whether he wanted to get out of the case", Mr. Kaplan said this (A 171a-72a):

"MR. KAPLAN: Judge, as you know, there are a lot of things that have happened in this case and for me to advise Mr. Lazarus of a -- to tell you the truth, there are a lot of -- there have been a lot of similar acts and a lot of possible evidence that the Government could present in this case.

For us to turn over all our possible evidence to the defense is quite an unusual procedure, in light of the turnover of 3500 material prior to trial.

THE COURT: I know, but this is a special situation, where a witness had been represented by counsel and counsel might have elected to consult with the client and determine whether he wanted to continue in the case."

Mr. Kaplan's above quoted answer to the trial judge's question as to his reason for not disclosing to Viera's counsel his intention of calling Mrs. Calvo as a witness conclusively refutes the statement in the Government's brief (p. 45) that the Assistant United

States Attorney's "failure to do so ... was obviously inadvertent - (as) there would be no reason to withhold the information." On the contrary, what is obvious is that Mr. Kaplan had a reason for not making the disclosure to Viera and his failure so to do was not inadvertent, it was deliberate.

(2)

The Government, in its brief (p. 45), concedes "that the Assistant United States Attorney should have disclosed his intention to call Mrs. Calvo ... even though Mrs. Calvo was prepared to waive any attorney client privilege..." Despite this concession, the Government contends that since the Assistant's failure to make this disclosure was "inadvertent" and did not constitute "deliberate misconduct" on his part, there is no basis for ordering a new trial "absent some showing of prejudice...".

The falsity of the first of these assumptions - that Mr. Kaplan's non-disclosure of his intention to call Mrs. Calvo was "inadvertent" - has already been demonstrated above. The second assumption - that there is no showing of prejudice to Viera as a result of the

non-disclosure - will now be discussed.

The Government's argument that Viera was not prejudiced by Mr. Kaplan's failure to disclose his intention to call Mrs. Calvo as a witness is based upon its contention that the failure of Mr. Lazarus, Viera's counsel, to cross examine Mrs. Calvo or allude to her in his summation must have been approved by Mr. Viera and was nothing more than "a contrived effort to exclude Mrs. Calvo's testimony, and failing that, to preserve an issue for appeal". (Resp't.'s br. p. 46) There is nothing in the record before this Court to support either of those contentions. The trial judge conducted no hearing to ascertain those facts nor did he make any findings with respect thereto.

It is respectfully submitted that, if the factual contentions upon which the Government's argument is based, are deemed by this Court, if true, to be legally valid, then this Court should remand the matter to the trial judge to hold a hearing and make findings of fact on the basis of the evidence adduced therein.

At such a hearing, Viera will be prepared to

establish that, far from approving the action of his trial counsel in failing to cross examine Mrs. Calvo, he vociferously stated his objection thereto and was (without explanation) overruled by his counsel.

Petitioner contends, as he did in his main brief (p. 64), that since the Sixth Amendment guarantees a defendant a right to retain counsel of his choice, any substantial impairment or obstruction of that right ipso facto prejudices a defendant and "violates not only the Sixth Amendment but the due process clause in the Fifth Amendment."

The effectiveness of Mrs. Calvo's testimony cannot be overlooked. If true, it strongly supported the conspiracy charge set forth in the first count of the indictment as well as the other substantive counts upon which Viera was found guilty. Coming as it did at the end of the Government's case, Mrs. Calvo's testimony, which was left unchallenged by Viera's counsel, had to have had a strong influence on the jury's ultimate verdict.

CONCLUSION

For the reasons stated above and in appellants' main brief (Point VII), the judgment of conviction as to appellant Viera should be reversed and a new trial ordered.

Respectfully submitted,

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Counsel to Appellant Viera

11/5
granted in court

STATE OF NEW YORK)SS.:
COUNTY OF NEW YORK)

Frances Satz, being duly sworn, deposes and
says: deponent is not a party to the action, is over
18 years of age and resides at Bronx, New York.

On November 3, 1975 deponent served the within
Appellant Viera's Reply Brief upon:

Honorable David G. Trager
U.S. Attorney for the Eastern
District of New York
Federal Courthouse
225 Cadman Plaza
Brooklyn, New York

Patrick M. Wall, Esq.
Attorney for defendants-
Appellants McClean and
Codelia
36 West 44th Street
New York, N.Y. 10036

the addresses designated by said attorneys for that
purpose by depositing a true copy of same to each of
them enclosed in a post-paid properly addressed wrapper
in an official depository under the exclusive care and
custody of the United States Postal Service within the
State of New York.

Sworn to before me this
3rd day of November, 1975.

Herman Liebllich
HERMAN LIEBLICH
Notary Public, State of New York
No. 412359210
Qualified in Queens County
Commission Expires March 30, 1977

Frances Satz

Frances Satz

